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In the Supreme Court of the United States

OCTOBER TERM, 1990

SOCIETY NATIONAL BANK AND JOEL A. PANDON,
PETITIONERS

v.

ROBERT WARREN AND CAROLE Z. WARREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Respondents, a participant in two employee benefit plans and his beneficiary, brought a civil action under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), for damages that allegedly occurred because petitioners, the plans' trustee and administrator, disregarded respondents' instructions and distributed their share of the plans' assets in a manner that resulted in the loss of significant tax advantages that were contemplated by the plan documents. The question presented is whether respondents may recover monetary damages for an economic loss of this nature as "other appropriate equitable relief" under Section 502(a)(3).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Society National Bank (SNB) was the trustee of a pension plan and a profit-sharing plan established by the Westgate Medical Anesthesia Group, Inc.; petitioner Joel A. Pandon, an SNB official, was responsible for administering the plans. Respondent Robert Warren was an employee of Westgate and a participant in the two plans; respondent Carole Z. Warren, his wife, was a beneficiary of the plans. Pet. App. A2-A3, A28-A29. Under the plans, participants could, upon retirement, choose to withdraw their share of plan assets in a number of ways, including a single lump-sum distribu-

tion. The summary plan description informed participants that they could "reduce, or defer entirely, the taxes due on [their] distribution through * * * [t]he rollover of all or a portion of the distribution to an IRA [Individual Retirement Account]." *Id.* at A5, A33.[1]

According to respondents' amended complaint, Robert Warren selected the lump-sum distribution option and chose to roll his benefits over into an IRA in order to take advantage of the associated tax benefits, and so instructed petitioners.[2] Contrary to those instructions, petitioners transferred the assets in four installments, two in 1984 and two in 1985. The complaint further averred that, because the rollover did not take place in a single calendar year, the tax laws required respondents to pay income taxes on the 1985 portion of the distribution, thus losing the benefit of the tax deferral contemplated in the plan. Consequently, respondents paid $87,205 in state and federal taxes on the 1985 distribution. In addition, respondents claimed, they could not keep the 1985 distribution in the IRA, and therefore they lost the benefit of the tax-free compounding of interest available from an IRA. They estimated that their eventual loss caused by the failed rollover would total $375,430. Pet. App. A3-A4, A29-A30.

2. Respondents brought an action under Section 502 (a)(3) of ERISA, which provides for a civil action by a participant or a beneficiary "(A) to enjoin any act or

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[1] A pension or profit-sharing plan that meets ERISA's minimum requirements for participation, funding, and vesting is exempt from taxes as a "qualified trust." 26 U.S.C. 401, 501. Neither the interest earned by a qualified trust nor the contributions to the trust are taxable until the year a distribution is received. 26 U.S.C. 402 (a)(1). In addition, as SNB's plans indicated, a beneficiary may defer taxation on a distribution under certain circumstances by rolling the proceeds over into an IRA, where interest also compounds on a tax-free basis. 26 U.S.C. 402(a)(5).

[2] Because the district court dismissed the case on the pleadings for failure to state a claim, the lower courts properly accepted respondents' factual allegations. Pet. App. A2, A31.

practice which violates any provision of this [title] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this [title] or the terms of the plan." 29 U.S.C. 1132(a)(3). Respondents sought to recover the tax losses allegedly caused by petitioners' failure to make a lump-sum distribution into the IRA within a single calendar year. Pet. App. A31. The district court held that the amended complaint failed to allege sufficient facts from which to infer that petitioners had been under specific instructions to distribute the assets by the end of the 1984 calendar year or otherwise had breached their duties under ERISA by failing to do so. *Id.* at A34-A36.

Alternatively, the district court concluded that the damages sought by respondents are not recoverable under Section 502(a)(3). The court noted this Court's holding in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), that extra-contractual damages are not available under Section 409 of ERISA, 29 U.S.C. 1109, for breach of fiduciary duty.[3] The district court also noted that several federal courts had extended *Russell* to preclude extra-contractual damages claims under Section 502(a)(3). Pet. App. A36-A37. While acknowledging that the distinction between contractual and extra-contractual damages is not clear, the court concluded that respondents were seeking extra-contractual damages because the relief they requested was "not ex-

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[3] Section 409(a) provides that a fiduciary who breaches his duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." Under Section 502(a)(2) of ERISA, 29 U.S.C. 1132(a)(2), suit may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409]."

pressly provided for within the terms of an ERISA-governed benefit plan." *Id.* at A39.

3. The court of appeals reversed. The court noted that *Russell* involved a different statutory provision (Section 409) and that this Court had emphasized in that case that it had "no occasion to consider" whether Section 502(a)(3), the provision at issue here, "authorizes recovery of extracontractual damages." Pet. App. A8. Moreover, four Justices had concluded in a concurring opinion in *Russell* that Section 502(a)(3), by authorizing "other appropriate equitable relief" in addition to injunctive and declaratory relief, contemplates a make-whole remedy, including monetary damages, under traditional trust principles. Pet. App. A14-A17.

In any event, the court of appeals did not view the damages sought here as "extra-contractual" within the meaning of *Russell*. In that case, there had been "no claim that the fiduciary * * * violated a contractual duty." Pet. App. A14. By contrast, the alleged damages in this case resulted from the violation of a "contractual duty" and are "direct injuries resulting from the bank's failure to follow [respondents'] instructions" to distribute their money in accordance with the terms of the plan documents. *Id.* at A13. For that reason, the court saw no conflict with the holdings of other courts of appeals that have disallowed extra-contractual damages under Section 502(a)(3). In this case, unlike the other cases, petitioners were deprived "of a benefit to which [they were] entitled under the plans" themselves. Pet. App. A18. The court added that "the plain language of the statute, the common law of trusts, and the role of courts in equity" all supported the availability of the relief sought by respondents. *Ibid.*

The court of appeals also held, contrary to the district court's primary alternative holding, that the amended complaint contained factual allegations sufficient to withstand a motion to dismiss. Pet. App. A19. In a concurring opinion, Judge Nelson stressed that a number of

factual issues need to be decided on remand, including whether a competent administrator would have distributed respondents' money in a single calendar year and whether petitioners' failure to do so actually resulted in the loss of tax advantages as respondents claim. *Id.* at A20-A21.[4]

Judge Wellford dissented. After emphasizing that a number of courts of appeals have held that extra-contractual damages are not available under Section 502(a)(3), he concluded, contrary to the majority, that there was "no allegation in [respondents'] amended complaint that [petitioner] SNB was under a specific duty or specific instruction to complete the transfer of funds by December 31, 1984." Pet. App. A26.

DISCUSSION

Petitioners do not challenge the court of appeals' holding that respondents alleged facts sufficient to support their claim that petitioners violated the terms of the plans and their duties under ERISA. Pet. 4 n.2. But petitioners challenge the court's holding that the relief respondents seek may be awarded under Section 502(a)(3).[5] In our view, the court of appeals correctly

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[4] Petitioners suggest (Pet. 3 n.1), without explanation, that respondents received "faulty tax advice" and should not have paid taxes on the 1985 distributions. However, a "lump sum distribution" must be made "within one taxable year" to receive favorable tax treatment. 26 U.S.C. 402(e)(4)(A). Thus, two distributions from the same plan in different years could not both be rolled over into an IRA unless the distributions qualified for favorable tax treatment under the special rules governing partial distributions. See 26 U.S.C. 402(a)(5)(D). As Judge Nelson stated, this matter remains to be addressed on remand.

[5] Petitioners also contend (Pet. 23-25) that respondents lack standing to bring suit because, in their view, Robert Warren is no longer a "participant" in the employee benefit plans and Carole Warren is not a "beneficiary" within the meaning of 29 U.S.C. 1002(7) and (8). In the district court, petitioners did "not dispute * * * that Robert and Carole Warren were a participant and

decided that Section 502(a)(3) authorizes federal courts to award make-whole relief to participants and beneficiaries for foreseeable losses that result directly from the breach of the terms of a plan or from a violation of one of ERISA's substantive requirements. Such authority, we believe, is embraced within the power to grant "other appropriate equitable relief" because that phrase is not limited to injunctions and declaratory judgments; rather it extends to the range of remedies developed by courts of equity in the enforcement and administration of trusts. And embraced within these remedies are monetary damages arising from breaches by fiduciaries of their contractual commitments.

That conclusion is not inconsistent with this Court's decision in *Russell* and does not conflict with the decisions of the courts of appeals that have held unavailable under Section 502(a)(3) types of damages not normally regarded as flowing directly from a breach of a fiduciary obligation or the terms of an employee benefit plan, *e.g.*, punitive damage awards, awards for emotional distress, and awards for certain other forms of extra-contractual damages. Further review by this Court is therefore not warranted.

1. This Court recently analyzed Section 502(a) generally, and Section 502(a)(3) in particular, in *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478 (1990). In that case, the Court held that a state cause of action alleging interference with the attainment of pension benefits was preempted because Section 510 of ERISA, 29 U.S.C. 1140, prohibits such interference and Section 502(a)(3) provides a cause of action to enforce Section 510. 111 S. Ct. at 484-485. The Court noted that "[t]he detailed provisions of § 502(a) set forth a comprehensive civil

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a beneficiary, respectively, under the retirement plans." Pet. App. A31 n.1. Nor was the issue raised in, or addressed by, the court of appeals. We think that persons such as respondents should be able to bring suit under Section 502(a)(3), but that the issue should not be considered initially by this Court.

enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 485, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987), and *Russell*, 473 U.S. at 146.

Although the Court in *Ingersoll-Rand* did not discuss in detail what remedies are available as "other appropriate equitable relief" under Section 502(a)(3), the Court, in reversing the judgment below, held that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.'" 111 S. Ct. at 486. The Court added: "It is clear that the relief requested"—which included a prayer for compensatory damages—"is well within the power of federal courts to provide." *Ibid.* Indeed, in cases involving interference with the attainment of benefits under a plan covered by ERISA, a number of federal courts have awarded make-whole relief, including back pay, front pay, restitution of forfeited benefits, and prejudgment interest, under Section 502(a)(3). See *Vogel* v. *Independence Fed. Sav. Bank*, 692 F. Supp. 587, 596 (D. Md. 1988); *Folz* v. *Marriott Corp.*, 594 F. Supp. 1007, 1015-1020 (W.D. Mo. 1984); *Bittner* v. *Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980).

This Court also recently analyzed Section 502(a) in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), which was an action seeking benefits under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B).[6] The Court held that a *de novo* standard of review applied with respect to the trustee's interpretation of the terms of the plan. In reaching that conclusion, the Court stated that since "ERISA abounds with the language and ter-

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[6] Section 502(a)(1)(B) provides that a participant or a beneficiary may bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

minology of trust law," it would be "guided by principles of trust law" in reaching its conclusion. 489 U.S. at 110, 111. But the Court added that prior to the enactment of ERISA, a court would have reviewed a claim for benefits under a plan "as it would have any other contract claim—by looking to the terms of the plan and other manifestations of the parties' intent." *Id.* at 112-113. The Court rejected the contention that an "arbitrary and capricious" standard applied with respect to review of the trustees' interpretation, and instead applied the standard that governs in contract cases, in part because the Court considered it unlikely that "ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* at 114.

Under *Firestone*, it is clear that the federal courts are to interpret ERISA's enforcement provisions with reference to the law of trusts. Contract law is also relevant, however, because ERISA was enacted "to protect contractually defined benefits," *Russell*, 473 U.S. at 148, and, in the absence of ERISA, state contract law would govern their enforcement. *Firestone*, 489 U.S. at 112-113. Since Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), any interpretation of Section 502(a) that limits participants and beneficiaries to more restricted remedies than contract law would provide is suspect. See *Firestone*, 489 U.S. at 114.

2. As this Court has repeatedly recognized, Section 502(a) provides "comprehensive" remedies. *Ingersoll-Rand*, 111 S. Ct. at 485, *Pilot Life*, 481 U.S. at 54; *Russell*, 473 U.S. at 146. In addition to authorizing actions "to recover benefits," Section 502(a)(1)(B) authorizes a participant or a beneficiary to bring a civil action "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of

the plan." Section 502(a)(3) further provides for injunctions to remedy "any act or practice which violates any provision of this [title] or the terms of the plan." Directly at issue in this case is the meaning of the next clause in Section 502(a)(3), which authorizes "other appropriate equitable relief * * * to redress such violations," such violations being "any act or practice which violates any provision of this [title] or the terms of the plan." [7]

Petitioners' principal contention—that "other appropriate equitable relief" does not embrace the relief sought in this case—is based in large part on the reasoning of the Ninth Circuit in *Sokol* v. *Bernstein*, 803 F.2d

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[7] The legislative history of Section 502(a)(3) is not particularly informative. The "other appropriate equitable relief" language was drafted, without accompanying explanation, by the Conference Committee. But Congress apparently intended ERISA's enforcement provisions to be interpreted broadly. Both the House and the Senate described the earlier versions of the section in identical terms: "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts." H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., II *Legislative History of the Employee Retirement Income Security Act of 1974*, at 2364 (Comm. Print 1976) [*Leg. Hist.*]; S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* I *Leg. Hist.* 621. At the time those statements were written, the House bill provided in terms only for actions "to recover benefits * * * or to clarify * * * rights to future benefits * * * [or] to enjoin any act or practice which violates any provision of this Act." H.R. 2, 93d Cong., 1st Sess. § 503(e) (1973), *reprinted in* II *Leg. Hist.* 2334. The Senate bill provided in terms only for actions "to recover benefits due * * * or to clarify * * * rights to future benefits." S. 4, 93d Cong., 1st Sess. § 604 (1973), *reprinted in* I *Leg. Hist.* 580. Neither bill provided for "legal remedies" in Section 502(a), unlike an early version of Section 409 (see *Russell*, 473 U.S. at 145-146 & n.14), although both congressional reports indicated that "the full range of legal and equitable remedies" were to be available.

532, 538 (1986). In that case, the court refused to authorize punitive damage awards under Section 502 (a)(3), and said that "Congress used the word 'equitable' to mean what it usually means—injunctive or declaratory relief." Relying on that statement, petitioners argue that "other appropriate equitable relief" authorizes courts to issue injunctions and declaratory judgments only. See Pet. 20. That reading of the statute is implausible, for a number of reasons.

First, petitioner's construction of Section 502(a)(3) virtually reads "other appropriate equitable relief" out of the statute. Section 502(a)(1)(B) authorizes declaratory judgment actions and coercive relief by providing that any participant or beneficiary may bring suit "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In addition, Section 502(a)(3)(A) authorizes courts "to enjoin any act or practice which violates any provision of this [title] or the terms of the plan." Thus, the phrase "*other* appropriate equitable relief," if it is to have any significance, must authorize equitable remedies in addition to injunctions and declaratory judgments.

Second, in *Ingersoll-Rand* this Court recognized that Section 502(a)(3) does not have the restricted meaning that petitioners would ascribe to it. 111 S. Ct. at 486. That conclusion follows naturally from the fact that Section 502(a)(3) is the broadest provision in the comprehensive enforcement scheme set forth in Section 502(a). While the other provisions of Section 502(a) are narrowly focused on matters such as benefit claims, fiduciary breaches, and violations of ERISA's disclosure provisions, Section 502(a)(3) provides for relief to redress "any act or practice which violates any provision of this title or the terms of the plan." Thus, for example, participants alleging interference with the attainment of benefits under a plan in violation of Section 510—the sort of violation that was at issue in *Ingersoll-Rand*—are au-

thorized to sue under Section 502(a)(3). As this Court recognized, 111 S. Ct. at 486, in the case of an employee who was fired so that his pension benefits would not vest, "other appropriate equitable relief" must extend beyond injunctive and declaratory relief. In appropriate cases, back pay, front pay, and other sorts of damages should be available.[8]

Third, in *Firestone* this Court rejected an interpretation of Section 502(a) that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 489 U.S. at 114. Petitioners' construction of Section 502(a)(3) would have precisely that effect. "Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law." 489 U.S. at 112. Under contract law, damages are intended "to place the aggrieved party in the same economic position he would have had if the contract had been performed." J. Calamari & J. Perillo, *The Law of Contracts* § 14-4, at 591 (3d ed. 1987); see also *Restatement of Contracts* § 329 (1932); *Restatement (Second) of Contracts* § 347 (1981); 5 A. Corbin, *Corbin on Contracts*, § 992, at 5-7 (1964); 11 S. Williston & Jaeger, *Williston on Contracts* § 1338, at 197-203 (3d ed. 1968). Contract law thus provides for a make-whole remedy.

Under the classic formulation of contract damages, an aggrieved party may recover the damages directly stemming from a breach of contract if the damages were foreseeable. *Hadley* v. *Baxendale*, 156 Eng. Rep. 145 (1854). That condition is satisfied when the damages "may fairly and reasonably be considered * * * arising

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[8] Title VII's authorization of "back pay * * * or any other equitable relief the court deems appropriate" (42 U.S.C. 2000e-5(g)) has been construed to authorize such damages, but not extra-contractual relief. See, *e.g.*, *Carroll* v. *General Acc. Ins. Co.*, 891 F.2d 1174, 1177 (5th Cir. 1990) (no pain and suffering award); *Goss* v. *Exxon Office Systems Co.*, 747 F.2d 885, 889-890 (3d Cir. 1984) (front pay award affirmed); see generally P. Cox, *Employment Discrimination* 23-1 to 23-14 (1988).

naturally, *i.e.*, according to the usual course of things, from such breach of contract itself" or when they "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." 156 Eng. Rep. at 151; see J. Calamari & J. Perillo, *supra*, § 14-5, at 594; see also *Restatement (Second) of Contracts*, *supra*, § 351. Moreover, the general rule is that the extent of the losses must be reasonably certain to be recoverable. J. Calamari & J. Perillo, *supra*, § 14-8, at 599-600.[9]

In this case, respondents' expectation interest was both foreseeable and reasonably certain. Tax benefits are at the heart of Congress's scheme for encouraging participation in pension plans.[10] Moreover, the expectation that participants would take advantage of the available tax benefits was specifically announced in the plan documents, which informed participants that "[t]he rollover of all or a portion of the distribution to an IRA" would reduce their tax liability. Pet. App. A5, A33. Accordingly, the tax benefits of a rollover "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract," and the loss of those advantages was a "probable consequence of the breach" respondents alleged. *Hadley* v. *Baxendale*, 156 Eng. Rep. at 151. Moreover, the loss of the

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[9] Because foreseeability and reasonable certainty are limitations on recoveries for breach of contract, the damages available in a contract action differ from the liability imposed in tort for all the damages proximately caused by the tortfeasor. See W. Prosser & P. Keeton, *The Law of Torts* § 92, at 665 (5th ed. 1984). As a rule, damages for emotional distress—which are generally available in a tort action—are not recoverable in a contract action. Nor are punitive damages. *Ibid.*; J. Calamari & J. Perillo, *supra*, §§ 14-3, 14-5(b), at 595-596.

[10] As the court of appeals stated, petitioners' actions "directly result[ed] in the loss of one of the most significant benefits available under ERISA". Pet. App. A18. In fact, ERISA requires plan administrators, "when making an eligible rollover distribution," to "provide a written explanation * * * of the provisions under which such distribution will not be subject to tax." 26 U.S.C. 402(f).

tax advantages was reasonably certain in that the immediate tax loss on the 1985 distribution ($87,205) could be precisely calculated and the total loss ($375,430) could readily be projected.

Thus, if in fact petitioners failed to make a single lump-sum payment, as respondents requested, and if that failure directly resulted in the tax losses that respondents allege, respondents would be entitled to be made whole, under contract law principles, for their losses. Such a remedy, in our view, is available under Section 502(a)(3).

3. In light of *Firestone* and the language of the provision itself, Section 502(a)(3) should be construed with reference to the trust principles developed by courts of equity. Since Section 502(a)(3) speaks of "other appropriate *equitable* relief * * * to *redress*" violations of the Act or the terms of a plan, the provisions of Section 199 of the 1 *Restatement (Second) of Trusts* (1959) (entitled "*equitable* remedies of beneficiary"), and especially Section 199(c) (providing for a suit "to compel the trustee to *redress* a breach of trust"), are therefore particularly relevant. 1 *Restatement (Second) of Trusts* 437 (1959) (emphases added). Section 199(c) provides damages as an "equitable" remedy in appropriate cases: the comment to Section 199(c), referencing Section 205 of the *Restatement*, explains that a "beneficiary can maintain a suit to compel the trustee to redress the breach of trust." 1 *Restatement (Second) of Trusts* 438 (1959). Section 205 provides monetary relief exclusively—in each of the ten examples illustrating Section 205 a trustee is required to pay money to a beneficiary.[11]

Moreover, like the traditional contract remedy, Section 205 provides make-whole relief. In addition to providing

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[11] For example, Illustration 5 provides: "A is trustee of $10,000 in cash. He deposits the money in a bank which he knows or has reason to know is insolvent. The bank fails and A recovers only $4000 from the bank. A is liable for the loss." 1 *Restatement (Second) of Trusts* 459 (1959). Illustration 6 similarly states: "A is trustee of a house. In breach of trust he fails to insure it against fire. The house burns. A is liable for the loss." *Ibid.*

that a trustee must turn over any profit he made by committing a breach of trust, Section 205 provides that a beneficiary has "the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust" or "of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 1 *Restatement (Second) of Trusts* 458 (comment a) (1959). Thus, "the general rule [is] that the object of damages is to make the injured party whole, that is, to put him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty. Both direct and consequential damages may be awarded." G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 701, at 198 (1982) (liability for breach of investment duties).[12] Accord *Russell*, 473 U.S. at 157 (Brennan, J., concurring); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975).

Thus, as the court of appeals ascertained, in appropriate circumstances monetary relief against a fiduciary is available in equity "if necessary to do complete justice." Pet. App. A17, citing *Goldberg* v. *Medtronic, Inc.*, 686 F.2d 1219, 1229 (7th Cir. 1982), and *Walters* v. *Marathon Oil Co.*, 642 F.2d 1098, 1100 (7th Cir. 1981); see *Russell*, 473 U.S. at 154 n.10 (Brennan, J., concurring), and *Albemarle Paper Co.*, 422 U.S. at 418. Monetary relief is thus not an exception to, but a particular application of, general equitable principles, and it requires no deviation from traditional trust doctrine to find such relief included within "other appropriate equitable relief." To the contrary, "[u]nless a statute in so many words, or by a necessary and inescapable inference, re-

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[12] For illustrative purposes, the treatise cites *Estate of Talbot*, 141 Cal. App. 2d 309, 296 P.2d 848 (Ct. App. 1956), in which the trustees were liable for a breach that imposed a capital gains tax burden on the beneficiaries of a trust.

stricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Co.*, 328 U.S. 395, 398 (1946).

Construing Section 502(a)(3) to provide a remedy that makes participants and beneficiaries whole for losses directly and foreseeably resulting from violations of the statute or the terms of a plan is particularly appropriate in the case of employee benefit plans because a plan has a dual character as both a contract and a trust.[13] Congress's intent was for "courts * * * to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, 489 U.S. at 110, quoting *Pilot Life*, 481 U.S. at 56; see also *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24

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[13] Prior to ERISA's enactment, the courts and commentators increasingly recognized the contractual nature of employee benefit plans. *Rochester Corp.* v. *Rochester*, 450 F.2d 118, 120-121 (4th Cir. 1971) (by rendering service for the period required under a plan, the employee's right is "no less contractual than if the plan were expressly bargained for" and "[w]hether the plan be contributory or non-contributory, the benefits, thus earned, are not gratuities"). Accord, *Hoefel* v. *Atlas Tack Corp.*, 581 F.2d 1, 4-7 (1st Cir. 1978) (endorsing the "modern view" as set forth in *Rochester* over the "discredited 'gratuity' theory" and holding that the plaintiffs had a "contractual right to their pensions"); Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 916-919 (1970); 1A A. Corbin, *supra*, § 153, at 18-20 (1963). Since ERISA's enactment, courts have continued to recognize the relevance of contract law. *Audio Fidelity Corp.* v. *Pension Benefit Guaranty Corp.*, 624 F.2d 513, 517 (4th Cir. 1980) (refusing equitable reformation of plan because "[t]he plan was a contract between [the employer] and its employees"); *Chicago Dist. Council* v. *Exhibition Contractors Co.*, 618 F. Supp. 234, 237-238 (N.D. Ill. 1985); *Vogel* v. *Independence Fed. Sav. Bank*, 692 F. Supp. 587, 591-592 (D. Md. 1988). Cf. *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573-575 & n.14 (1982) (invoking trust and contract principles to delimit trustees' obligations under post-ERISA collectively-bargained plan); *Sinai Hosp. of Baltimore, Inc.* v. *National Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562, 565-566 (4th Cir. 1982) (reconciling contract and trust principles as applied to employee benefit plan).

n.26 (1983); 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Williams); see Report of the Comm. on the Budget, H.R. 3299, 101st Cong., 1st Sess. 55-56 (1989). In fact, Congress expressly intended all actions brought under ERISA "to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* III *Leg. Hist.* 4594. Section 301, of course, not only confers jurisdiction on the federal courts, but also mandates recognition and development of a substantive law of labor contracts. *Pilot Life*, 481 U.S. at 55-56; see *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 199-200 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957). Thus, as this Court indicated in *Firestone*, although "ERISA abounds with the language and terminology of trust law" (489 U.S. at 110), that law is not mutually exclusive of contract law. Rather, in the context of construing ERISA plans and "deal[ing] with issues involving rights and obligations under private welfare and pension plans" (*Franchise Tax Bd.*, 463 U.S. at 24 n.26), the trust law incorporated into ERISA is built on a solid foundation of contract law.

Moreover, in enacting ERISA, Congress recognized that "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature." S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* I *Legislative History of the Employee Retirement Income Security Act of 1974*, at 615 (Comm. Print 1976) [*Leg. Hist.*]; H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* II *Leg. Hist.* 2359. Congress therefore expected the courts to adapt traditional trust law, "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act." *Ibid.* The goal was to equip a participant with the legal tools "to safeguard either his

own rights or the plan assets." *Ibid.* "[I]n enacting ERISA Congress made *more* exacting the requirements of the common law of trusts relating to employee benefit trust funds." *Donovan* v. *Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (emphasis added); see *Sinai Hosp. of Baltimore, Inc.* v. *National Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562, 565 (4th Cir. 1982). A remedy that makes participants and beneficiaries whole for losses directly and foreseeably resulting from the breach of the terms of a plan—the remedy that would have been available in the absence of ERISA—is accordingly warranted under Section 502(a)(3).

4. The court of appeals' decision that Section 502(a)(3) authorizes the damages respondents seek does not conflict with *Russell*, for the precise reasons the court gave. Specifically, both the "statutory bases" for the claim in this case and "the nature of the alleged injuries and relief sought" are materially different. Pet. App. A12.

As an initial matter, the plaintiff in *Russell* relied solely on Section 409, and this Court's opinion expressly left open the question of the type of damages available under Section 502(a)(3), the provision at issue here. 473 U.S. at 139 & n.5. This distinction is critical because Section 409 focuses exclusively on duties owed to the plan, rather than on duties owed to participants and their beneficiaries. In construing Section 409's authorization of "other equitable * * * relief," this Court viewed that Section's repeated emphasis on employee benefit *plans* as excluding "an entirely new *class* of relief available to entities other than the plan." 473 U.S. at 142. In contrast, Section 502(a)(3) provides for private actions to obtain "other appropriate equitable relief * * * to redress" losses suffered by individual participants or beneficiaries as the result of any violation of the Act or the terms of the plan. Therefore, affording respondents a remedy that

makes them whole for losses directly and foreseeably resulting from a breach of the plans under Section 502(a)(3) does not constitute a new class of extra-statutory relief, but rather is consistent with the language and purpose of the provision.

In addition, the decision below is not contrary to *Russell* because it concerns only the recovery of damages that would be available in a traditional contract action, rather than the "extra-contractual damages" that *Russell* rejected. The plaintiff in that case alleged that the defendants had delayed unreasonably in making medical benefit payments, and sought punitive damages, damages for aggravation of a psychological condition allegedly caused by the delay, and damages resulting from the cashing out of retirement savings allegedly necessitated by the delay. 473 U.S. at 137. As we have noted (note 9, *supra*), punitive damages and damages for emotional distress are not traditional contract remedies. Nor would damages resulting from the cashing out of spouse's funds due to a delay in payment under a plan appear to be the sort of directly foreseeable damages that are recoverable under *Hadley* v. *Baxendale*, *supra*. In this case, in contrast, respondents allegedly lost tax benefits that are both central to ERISA and contemplated by the terms of the plan at issue. Thus, unlike the plaintiff in *Russell*, respondents seek traditional contract damages rather than an "extra-contractual" remedy.

For the same reason, and as the court of appeals explained (Pet. App. A18), the appellate cases relied on by petitioners are distinguishable. Those cases involved claims for punitive damages, damages for emotional distress or similar injury, or unspecified extra-contractual damages.[14] No case involved a claim for lost tax benefits

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[14] See *McRae* v. *Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991) (seeking damages for emotional distress, embarrassment, humiliation, and damage to financial reputation); *Davis* v. *Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 696-697 (6th Cir. 1989) (punitive damages), cert. denied, 110 S. Ct. 1924 (1990);

or loss of some other benefit that was expressly contemplated by the terms of the plan at issue. Thus, there is no conflict among the circuits that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Amos v. *Blue Cross-Blue Shield*, 868 F.2d 430, 431 (11th Cir.), cert. denied, 110 S. Ct. 158 (1989) (punitive and unspecified extra-contractual damages); *United Steelworkers* v. *Connors Steel Co.*, 855 F.2d 1499, 1508-1509 (11th Cir. 1988) (unspecified extra-contractual damages), cert. denied, 489 U.S. 1096 (1989); *Drinkwater* v. *Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-825 (1st Cir.) (punitive and extra-contractual damages for misrepresentation), cert denied, 488 U.S. 909 (1988); *Varhola* v. *Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages); *Sokol* v. *Bernstein*, 803 F.2d at 534-539 (punitive damages); *Hancock* v. *Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306-1307 (9th Cir. 1986) (unspecified extra-contractual damages); *Powell* v. *Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), (punitive damages and damages for emotional distress), cert. denied, 476 U.S. 1170 (1986).

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